Tobias Kotzin Company *and* **Febronio Figueroa.** Case 21-CA-18792

23 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 April 1981 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Febronio Figueroa for walking off the job without authority in protest of the Respondent's denim piece work rate. Although Figueroa acted alone and for his own benefit in walking off the job the judge found that Figueroa was engaged in protected concerted activity relying on *Steere Dairy*, 237 NLRB 1350 (1978); *Hansen Chevrolet*, 237 NLRB 584 (1978), and *Ontario Knife Co.*, 247 NLRB 1288 (1980), progeny of *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

In the recent decision in *Meyers Industries*, 268 NLRB 493 (1984), the Board held that the activities of a single employee will not be found to be "concerted" within the meaning of the Act unless they are engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. In so doing we overruled *Alleluia Cushion* and its progeny's test for concerted activity, which was used by the judge herein.

It is clear here that Figueroa acted alone and for his own benefit in walking off the job. Contrary to the judge's analysis, Figueroa's singular protest did not become concerted simply because (1) the subject matter involved a matter of common interest to employees, i.e., wages; and (2) other employees, independent of Figueroa, had complained about the denim piece work rate. Accordingly for reasons fully set forth in *Meyers* we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

I agree with my colleagues that employee Febronio Figueroa was not engaged in concerted activity when he was discharged, but I do so for the reasons set forth below.

The record shows that on Tuesday, 19 February, the Respondent introduced a piece rate for a new product made of denim. Several employees complained to the department supervisor that the rate was too low, and on Wednesday a new timestudy was conducted which resulted in the same rate. The employees made no other objections[1] and did not attempt to use appeal procedures to higher management. On Thursday morning employees were assigned the denim work, and after about 15 minutes Figueroa told the supervisor he would not work for the rate and left the plant. The remaining employees continued to work on the denim so long as that work was assigned, a period of about 1 to 1-1/2 hours.

As I interpret these facts, Figueroa acted as an individual in protesting the new rate. Any group complaint that employees made on Tuesday about the denim rate had been resolved when Figueroa walked off the job. Management had responded to the employee complaints with a new timestudy, and the employees had taken no other action. They had sought no further redress and on Thursday performed the denim work assigned at the rate they had previously protested. I find no evidence linking Figueroa's "walkout" on Thursday to the earlier complaints of employees, or in any way indicating that he was acting in concert with other employees when he walked off the job.

I do not agree with the judge's statement in finding that Figueroa was discharged for engaging in concerted activity that:

> . . . to be protected by Section 7, it need not be shown that an individual employee acted on behalf of other employees and not solely for personal reasons. The Board's test for a concerted activity is whether the activity involves a group concern . . . .

Even if it can be presumed that an individual action involving a group concern constitutes concerted activity, any such presumption concerning Figueroa's walkout has been rebutted by the fact that the employees' protest over the new piece rate had ended.

[1] The judge found that the record established that employees also complained to the Respondent about the rate after the second timestudy. As the Respondent correctly notes, the administrative law judge misconstrued the record. The record shows that employees complained about the piece rate only after the first timestudy.

Accordingly, inasmuch as Figueroa acted alone in walking off the job in protest of the new rate, and there is no basis for inferring that his individual action constituted concerted activity, I would dismiss the complaint.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was tried in Los Angeles, California, on November 5, 1980.[1] The complaint, which issued on April 30, pursuant to a charge filed on March 13, alleges the February 22 discharge of Febronio Figueroa, because he engaged in protected concerted activity. The Respondent contends Figueroa walked off the job without prior permission, and that he was not engaged in protected concerted activities. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by both the General Counsel and the Respondent, and have been carefully considered.

Upon the entire record in the case,[2] and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Tobias Kotzin Company is engaged in the manufacture and sale of men's clothing. It annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside California, and annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside California. It is admitted and found that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ISSUE

Whether Figueroa was engaged in protected concerted activities for which he was terminated.

Figueroa was the only witness called by the General Counsel. In addition to contradicting himself, much of his testimony is directly refuted by witnesses for the Respondent; witnesses who presumably could corroborate Figueroa's testimony were not called, nor was an explanation given for the failure to call them, leading to the inference that had they been called their testimony would not have been favorable to Figueroa. Further, the Respondent showed, through documentary evidence, that conversations Figueroa claims he had with fellow employees on Thursday, February 21, could not have occurred since the employees had either not yet reported for work that morning, or had not worked since Monday. In short, Figueroa was an unreliable witness and I do not credit his testimony where it conflicts with that of any of the other witnesses.

[1] All dates are in 1980 unless stated otherwise.

[2] Errors in the transcript have been noted and corrected.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

The Respondent manufactures and sells men's sportswear, with two manufacturing facilities in Los Angeles and one in Louisiana. The facility at 420 South San Pedro street in Los Angeles is the only one involved in this proceeding. Febronio Figueroa was one of eight "hot-head legger pressers" in the pressing department, which was comprised of about 75 employees. Humberto Ramirez is the pressing department supervisor. He reports directly to Gilberto Abrego, the pressing department manager. Abrego is directly responsible to Director of Manufacturing Mario Horowitz. Joseph Rodriguez is the vice president, personnel, whose responsibilities included the approval of hires, terminations, interpreting and enforcing personnel policies, and resolving grievances. The Respondent admits that Rodriguez and Abrego are supervisors and agents of the Respondent, and it is so found. While the Respondent denied in its answer that Ramirez is a supervisor and agent, it stipulated that he possessed authority to allow employees to go home early. In light of that authority, and as it is clear he was the pressing department employee's link to management, I find Ramirez is a supervisor within the meaning of Section 2(11) of the Act.

Figueroa started working for the Respondent in 1966. The record shows the pressing department employees are paid on a "piece rate" basis. When a new style or material is introduced, a timestudy is conducted by the industrial engineering department on several employees selected at random, and a "piece rate" established for the new item. If an employee is dissatisfied with the rate that has been established, he may request his supervisor, in this instance Ramirez, for a review of the rate. This usually results in another timestudy. Thereafter, appeals may be made by the employee to the director of manufacturing and then to the vice president of manufacturing. Appeals are a frequent occurrence, and employees are familiar with the appeals procedure.

In mid-February, a new denim product was introduced. As the material was heavy, Ramirez initiated a timestudy, which was conducted on February 14 and 15 and resulted in the establishment of a piecework rate of $6.20 per 100 pieces worked, effective Tuesday, February 19.[3] On Tuesday, February 19, Manuel Fajardo, Matilde Nevarez, and Everardo Vidrio complained that the piecework rate was too low.[4] On Wednesday, February 20, a new timestudy was made, which resulted in the same rate, $6.20. While Ramirez testified at one point that there was no reaction from the employees when he informed them of the results of the second timestudy, he also testified that they complained after he had given

[3] Figueroa was on layoff the week of February 11-16. The date of the first timestudy is based on the testimony of Rodriguez.

[4] There is some confusion in the record as to whether the complaint was made on Monday afternoon or Tuesday. As noted, the new rate did not go into effect until Tuesday, and the timecards show that no one worked Monday afternoon. Accordingly, I conclude, as noted herein, that the three employees complained about the new rate on Tuesday and a new timestudy was done on Wednesday.

them the rate. It is undisputed that at no time did the denim exceed 10 percent of the work.

B. *The Alleged Concerted Activity*

Throughout his testimony, Figueroa portrayed himself as the spokesman for the pressing department employees. He claimed that, 4 or 5 years ago, Pressing Department Manager Abrego had recommended to the ironers that they choose a spokesman. He listed the names of those employees allegedly present. Consequently, he testified, both he and Fernando Guillinta were selected. While at one point he testified he did not remember ever notifying any member of management that he had been selected as an employee spokesman, he also testified he "always" spoke to Abrego on behalf of his coworkers. Abrego, on the other hand, denied he ever told the employees to select a spokesman for other employees. Prior to becoming the pressing department supervisor in January 1977, Ramirez was a presser. Corroborating Abrego, he testified that Abrego never told the pressing department employees that they should select a spokesman or that Figueroa ever acted as a spokesman for any other employees. None of the other pressers was called to support Figueroa's claim that he was a spokesman, nor was an explanation given for the failure to do so, leading to the inference that, had they been called, their testimony would not have been favorable to Figueroa. Accordingly, I do not credit Figueroa, and do credit the testimony of both Abrego and Ramirez. The record does not show that Figueroa was selected as a spokesman by the pressing department employees, nor that he acted as their spokesman for a span of 4 to 5 years as he claims. Consequently, I do not credit Figueroa's testimony that, as a result of conversations with other employees during January, he told Abrego in early February that "we were not satisfied" with the rate set for denim and that Abrego indicated he would see what could be done.

Figueroa testified that he arrived at work about 6:30 the morning of February 21 and immediately punched in.[5] He claimed he proceeded immediately to the lunchroom where some of the other pressers were, and that they discussed the denim rates. While the General Counsel failed to call any witnesses to corroborate Figueroa's testimony, Figueroa claimed that he engaged in a group discussion with employees Pedro Rios, Jose Alvarado, Isidro Salgodo,[6] Jesus Maria Gonzalez, and Juan Barron[7] within 5 minutes of his arrival at work, and all indicated displeasure with the denim rate and said that Figueroa should be their representative. After the group discussion, he testified, he had more discussions with unnamed individuals before going to his work station at 6:50 or 6:55 a.m. He had no further discussions concerning denim rates with the fellow employees that day. Thus, all of his purported discussions occurred between 6:30 and 6:50 or 6:55 a.m., the group discussion having preceded the individual discussions. Figueroa claimed the first individual with whom he spoke was Pedro Rios. Employee timecards, introduced into evidence by the Respondent, showed Rios arrived at 6:53 a.m.; Alvarado at 6:58 a.m.; Salgado and Gonzalez were on layoff after Monday, February 18, and did not work on February 21; and Barron did not come to work until 7:11 a.m. It is also noted that Figueroa made no mention of any discussions with other employees that morning in an investigatory affidavit given a Board agent on March 13. On the foregoing, I conclude that Figueroa did not tell the truth, and find that he did not engage in any discussions with any other employee or employees on February 21 concerning the piece rate for denim.

Figueroa commenced working at 7 a.m. on polyester. About 7:30, denim was brought out to be ironed. Despite his admission on cross-examiniation that he did not have discussion with any of the pressers concerning the denim rate after the shift began, Figueroa testified on direct examination that, when the denim was brought out, his coworkers said "that we should do something because we could not iron it at that price." He claims that he then asked Ramirez "what was happening to our demand that we [would] if we had gotten some raise," and that Ramirez responded that he had better get used to it since denim was all the Company was going to produce. According to Figueroa, he responded "that we would not refuse to do it, but we could not do it at that price." Ramirez purportedly told him there was nothing he could do about it. Figueroa testified, "I left to continue my work, and the rest of the coworkers told me we had to do something. I told them I had already spoken to the man, but we could get nothing." He claims that after working about 15 minutes he approached Ramirez and "I told him that if it was definite that we could not get anything, that if he would give me permission to go home," and that Ramirez responded, "Okay, you can go." When he turned in his timecard and piecework reports to Mario Urbano, he stated he told Urbano "that I had asked for permission, that I had been allowed to leave, and that I was going." He testified that as he was leaving he told Isabel Alarcon that "the work was very very poorly paid for and that we were not satisfied, and that I had asked him permission, and I had been given permission to leave." Ramirez, whom I credit, testified that he was not aware of any conversations between Figueroa and his coworkers regarding the denim rates; that Figueroa approached him and said, "Umberto, this job at $6.20 I will not do. I am going home," and that he responded, "No way Figueroa"; that Figueroa then turned in his piecework tickets, punched out his timecard, and left without speaking to any other employees. In addition to denying he gave permission for Figueroa to leave, he denied he had had any conversation with Figueroa earlier that morning. Urbano testified that Figueroa did not tell him that he, Figueroa, had permission to leave. While Isabel Alarcon was not called as a witness by the General Counsel to corroborate Figueroa, leading to the inference that her testimony would not have supported Figueroa, she later told Rodriguez, Abrego, Horowitz,

[5] All employees punch in on the timeclock as soon as they arrive.

[6] Figueroa waffled on Salgado. He testified at one time that Salgado was in the group discussions; at another that he did not speak to Salgado; and at a third time Salgado indicated he was dissatisfied with the denim rates.

[7] While Figueroa testified on direct examination that Barron was present, on cross-examination he did not think he was there, and then was certain he was.

and John Acquafresca that as Figueroa was leaving she asked where he was going and he replied he was leaving because "they don't want to pay for the denim." The thrust of the foregoing is that again Figueroa has been proven to be an untruthful witness. Contrary to Figueroa's testimony, I am convinced he was not an employee spokesman nor did he purport to be at that time, and that he left the job without the permission of his supervisor because he was personally dissatisfied with the piecework rate, and, as he acknowledged on cross-examination, because he "had a few problems at home."

Ramirez reported the fact that Figueroa walked off the job to Abrego, who reported the fact to Rodriguez and Horowitz. Rodriguez instructed Abrego to "pick up his timecard and do the regular procedure that we do, which is fill in the paperwork for when a person walks off the job," so that the final paycheck could be prepared. When he showed up the following morning, Abrego advised Figueroa that he was terminated for having left the previous day without permission. Figueroa contended he told Abrego that Ramirez had authorized his leaving the day before, which Abrego denied, ending with "besides that it is too many problems that you give us." Abrego, whom I have found to be a reliable witness, denied Figueroa's version. Figueroa initially denied he had ever seen a copy of the Respondent's rules and regulations, which contain the following provision:

> *LEAVING EARLY . . . . Do not leave your work station before the end of your shift*, unless your supervisor has authorized or requested otherwise.
>
> . . . .
>
> A violation of a company regulation could result in disciplinary action up to and including termination.

Confronted with his signature acknowledging receipt of a copy and that he had read, understood, and agreed to observe them, he finally admitted he had seen them.

On February 27, Figueroa called Rodriguez to see if he could get his job back. According to Rodriguez, who I find is more credible than Figueroa, he learned for the first time that Figueroa claimed that Ramirez had given him permission to leave. Rodriguez agreed to check it out, and after determining that Ramirez denied authorizing Figueroa permission to leave early, called Figueroa back and informed him that the termination stood. On March 3, Figueroa and three employees met with Rodriguez and presented him with an employee petition, apparently requesting he be rehired. Rodriguez explained that it was necessary to have rules, regulations, and procedures for doing things or else their would be anarchy in the factory.[8] After Figueroa contended that Isabel Alarcon would corroborate his claim that Ramirez had given him permission to leave on February 21, Rodriguez agreed to review the matter again. After determining that Alarcon did not corroborate Figueroa, Rodriguez advised one of the employees who had appeared with Figueroa on March 3 that the termination would have to stand.

[8] The Respondent's rule against leaving early witout authorization had been enforced on one occasion in 1978, and twice after February 1980, by terminations.

Contentions of the Parties

The General Counsel contends Figueroa's "walk out" on February 21 was in the nature of a protest concerning the new denim piece rate and "is clearly protected concerted activity," and that "one employee's individual protest is considered 'protected concerted activity' where it involves a matter of common concern to other employees." It is contended that all employees routinely registered complaints concerning new rates, and that, on February 20, several other employees registered complaints to Ramirez about the low pay rate for denim material. Thus, it is contended, the concerted protected nature of the protest by Figueroa on February 21 has been unquestionably established. Therefore, it is immaterial whether Figueroa may or may not have been designated or selected as a spokesman or representative of the other employees. Thus, an individual's protest activity is "concerted and protected" irrespective of whether he was overtly designated by other employees to act on their behalf, where it is clear that the fellow employees, as here, shared that employee's concern and interest in the subject matter. It is argued that since Figueroa "walked out" in protest over the denim rate, and returned to work the next day, it is clear he did not quit his job and the Respondent's attempt to characterize the "walk out" as tantamount to quitting is legally indefensible. The Respondent contends that Figueroa was not a spokesman for any group of employees, that his complaint concerning the piecework rate for denim was purely personal, that he did not seek or obtain permission to leave work on February 21, thus making his departure from work on that date without such authorization an abandonment of his employment; that no supervisory or managerial employee had any knowledge or information that would have suggested or implied that Figueroa was voicing a complaint shared by others when he walked off the job on that date; that the refusal to reinstate him the following day was not motivated by a desire to retaliate against him and that his actions on February 21 and 22 did not constitute concerted activity protected by Section 7 of the Act.[9]

Discussion

The credited evidence fails to establish that Figueroa was ever selected by or acted as a spokesman for his fellow employees, that he so much as discussed the denim piecework rate with any other employee, or that he expressed any dissatisfaction with the rate other than to tell Ramirez, on February 21, that he would not work for that rate and was therefore leaving. Having discredited his testimony that his expression of unhappiness with

[9] In its brief, the Respondent cited various court decisions. To the extent that those cases may be inconsistent with current Board law, the Board has long held that it is the duty of an administrative law judge "to apply Board precedent which the Supreme Court has not reversed." *Iowa Beef Packers*, 145 NLRB 615, 616 (1965).

the denim piecework rate was couched in the plural, the question is whether his singular activity of leaving work without authority, in violation of the Respondent's rules and regulations, can be concerted and protected by virtue of the fact that the denim piecework rate was a matter of common interest to all employees. Of significance is the fact that Ramirez testified that employees Manuel Fajardo, Matilde Nevarez, and Everardo Vidrio also complained about the denim piecework rate on February 20, after the second timestudy had been made and it was announced that the rate would remain the same. Thus, it is seen that Figueroa's concern with the piecework rate for the denim, which was a uniform rate for all pressers, indeed involved a matter of common concern and interest to the other employees and that Ramirez was aware of it. Under Board cases, this requires a conclusion that Figueroa's individual protest against the denim piecework rate (which involved a pay rate of all the pressers) was thus a concerted activity protected by Section 7 of the Act. *Steere Dairy*, 237 NLRB 1350 (1978); *Hansen Chevrolet*, 237 NLRB 584 (1978). Contrary to the Respondent's contention, to be protected by Section 7 it need not be shown that an individual employee acted on behalf of other employees and not solely for personal reasons. The Board's test for a concerted activity is whether the activity involves a group concern—here, the wages of the pressers. Since Ramirez was aware of the concern of not only Fajardo, Nevarez, and Vidrio, but also of Figueroa, over the piecework rate, it cannot validly be argued that the Respondent was not aware of the concerted nature of Figueroa's protest. In *Ontario Knife Co.*, 247 NLRB 1288, 1288–89 (1980), the Board stated:

> It is well settled that employees have the right to leave work in support of a grievance pertaining to terms and conditions of employment. *Blue Star Knitting, Inc.*, 216 NLRB 312, 316 (1975); *NLRB* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). When this occurs, an employer may not lawfully discipline an employee for breaking a company rule concerning leaving work without permission; for to allow it would abrogate the statutory right to withhold services in support of a grievance. Furthermore, the fact that Cobado left work alone does not prevent her walkout from being protected concerted activity. The Board has in the past found walkouts by single employees to be protected concerted activity. Most recently, in *Steere Dairy, Inc.*, 237 NLRB 1350 (1978), we found a single employee's walkout to protest a change in terms and conditions of employment for all employees was protected concerted activity despite the refusal of other employees to join in. Similarly, in the present case, the machete grievance was a group concern of second-shift employees, and Cobado and Swift were engaged in group action up to the point when Cobado walked out alone. (We note that Coabdo and Swift told Peterson that the next time they were assigned to do machetes they were going to refuse.) It follows, *a fortiori*, that Cobado's individual protest was protected because it involved a group concern—the work assignment of all second-shift employees.

Based on the foregoing, it is found that Figueroa's walkout was a protected concerted activity, and that his discharge for leaving work without permission violated Sectin 8(a)(1) of the Act. It follows that the Respondent's refusal to reinstate him on February 22 also violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging and refusing to reinstate Febronio Figueroa for engaging in protected concerted activity, the Respondent committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]